

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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| TED MARCUM, | : | Case No. C-1-02-425 |
| | : | |
| Petitioner, | : | JUDGE WEBER |
| | : | |
| vs. | : | MAGISTRATE JUDGE BLACK |
| | : | |
| OHIO ADULT PAROLE AUTHORITY, | : | |
| | : | |
| Respondent. | : | |
| | : | |

OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

A. INTRODUCTION

Respondent Margaret Bagley respectfully objects to the certificate of appealability recommendation contained within the Magistrate Judge's thorough and well-written Report in this case. Respondent does **not** object to the Magistrate Judge's recommendation that Marcum's habeas corpus petition be denied with prejudice.

B. ARGUMENT

A decision on the propriety of a certificate of appealability should be stayed pending the Sixth Circuit's decision in Lopez v. Wilson.

The Magistrate Judge's recommendation that Marcum should be granted a certificate of appealability on four of his seven grounds for relief is predicated upon his concern that Ohio Appellate Rule 26(B) is an inadequate procedural rule when considered in conjunction with *White v. Schotten*, 201 F. 3d 743 (6th Cir.), *cert. denied*, 531 U.S. 940 (2000). (Report at 16). Specifically the Magistrate Judge cites to dicta in *White* which suggests that indigent inmates could have a constitutional entitlement to counsel with respect to the filing of timely reopening applications.

For reasons discussed both in Respondent's Return of Writ, as well as the Magistrate Judge's Report and Recommendation, it is Respondent's position that the dismissal of Marcum's habeas petition is fully warranted and that a certificate of appealability should therefore not issue. More importantly, Respondent notes that the Sixth Circuit Court of Appeals has recently granted *en banc* review in *Lopez v. Wilson*, 366 F.3d 430 (6th Cir. 2004). It is Respondent's belief that the Sixth Circuit will use *Lopez* as a means to resolve the deep conflicts within Sixth Circuit precedent emanating from *White* and its progeny regarding the treatment of Ohio Appellate Rule 26(B). In this regard it would seem fairly certain that *Lopez* will remove any reason for a further consideration of the waiver issues presented in this case. As such in the interest of judicial economy, Respondent submits that this Court should withhold a ruling on Marcum's entitlement to a certificate of appealability until such time as the Sixth Circuit has promulgated its *en banc* decision in *Lopez*.

C. CONCLUSION

For the foregoing reasons Respondent Ohio Adult Parole Authority respectfully submits that this Court should not adopt the Magistrate Judge's recommendation to grant Marcum a partial certificate of appealability. Instead, Marcum should either be denied a certificate of appealability for reasons discussed with Respondent's Return of Writ and the Magistrate Judge's report, or a decision with respect to the propriety of a certificate of appealability should be held in abeyance pending the Sixth Circuit's *en banc* decision in *Lopez v. Wilson*. Respondent finally urges this Court to adopt the Magistrate Judge's recommendation to dismiss Marcum's petition with prejudice.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio

s/STUART A. COLE
Stuart A. Cole (0020237)
Assistant Attorney General
Corrections Litigation Section
150 E. Town St., 15th Floor
Columbus, Ohio 43215
614/644-7233
Fax (614)728-9327

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Respondent Ohio Adult Parole Authority's Response to Court Order was sent to Ted Marcum, 239 North Ninth Street, Hamilton, Ohio 45011, via regular U.S. mail on this 22nd day of June 2004.

s/Stuart A. Cole
Stuart A. Cole
Assistant Attorney General